

[*James v. Pritts-McEnany Roofing, Inc.*](#), 96-ERA-5 (ALJ Nov. 25, 1996)

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U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

Date issued: NOV 25 1996
Case No. 96-ERA-5

In the Matter Of

TRACY A. JAMES,
Complainant,

vs.

PRITTS-MC ENANY ROOFING, INC.,
Respondent.

**ORDER REGARDING
PROPOSED SETTLEMENT**

This matter is before the undersigned Administrative Law Judge for a recommendation regarding the parties' proposed settlement agreement. Tracy A. James filed her complaint pursuant to the employee protection provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851. The case proceeded to hearing April 16, 1996. A Recommended Decision and Order finding in favor of complainant issued on August 22, 1996, from which the employer took an appeal. The case is now pending before the Administrative Review Board. Counsel for the parties have notified the undersigned that they have settled the case, and have submitted a settlement agreement signed by all parties and their counsel, a copy of which is attached. The purpose of the instant decision and order is to evaluate the proposed settlement to determine whether it is reasonable, fair and adequate.

I. Terms of Settlement Agreement

The terms of the settlement agreement, in summary, are:

1. That Respondent will pay the sum of \$25,000.00 to Complainant on or before November 11, 1996, a payment personally guaranteed by Respondent's president, Michael McEnany. The agreement does not provide for the payment of attorneys' fees.
2. In exchange, Complainant agrees to waive all causes of action, statutory and common law, federal, state and local, against Respondent (1) arising from her employment with Respondent with or separation from that employment and (2) arising after the date of the settlement agreement, except for certain vested rights to benefit or compensation plans.
3. Respondent also agrees to waive all causes of action against Complainant.
4. Complainant agrees not to seek re-employment with Respondent.

II. Discussion

Regarding the proposed payment of \$25,000.00, I find this sum fair, adequate and reasonable, in that it is identical to the sum that the undersigned recommended be awarded to Ms. James. However, the settlement agreement does not discuss the question of attorneys' fees. Normally, a prevailing complainant in a whistleblower case has the burden of establishing the reasonableness of the fees by submitting a fee petition detailing the work performed, time spent, and the hourly rate. The fee arrangement between complainant and her counsel is not controlling. Delcore v. W.J. Barney Corp., et al., 89-ERA-38 (Sec'y June 9, 1995) (Secretary's D&O of April 19, 1995 affirmed at 85 F.3d 89 (2d Cir. 1996)). If the parties agree, it is not necessary for the Secretary to review the fee petition with the specificity required under the lodestar method, but it is nevertheless necessary that the amount be disclosed. Carter v. Electrical District No. 2 of Pinal County, 92-TSC-11 (Sec'y April 24, 1996). Here, it is possible that the parties have agreed that Ms. James will be responsible for fees from the \$25,000.00 payment under an arrangement not disclosed by the agreement itself. If this is the case, it is not possible to determine the amount Ms. James will actually receive. The Secretary must know the amount Complainant will receive in order to determine if the agreement is fair, adequate and reasonable. The disposition of the \$25,000.00 affects not only Ms. James' individual interests, but the public interest as well, in that if the amount she actually receives is not fair, adequate and reasonable, other employees may be discouraged from reporting safety violations. Id.

I find no error in the agreement regarding the mutual waivers of claims, though the provisions for waiver could possibly be misinterpreted to frustrate the purposes of the Energy Reorganization Act. I recommend approval of those provisions based on an interpretation that they waive only the right to seek damages in the future, as the agreement itself recites, based on claims or causes of action arising out of facts occurring before the date of the agreement, and restrict in no way the ability of Ms. James to participate as, for example, a witness in the claims of other persons who have been or may in the future be subjected to retaliatory acts for having raised safety concerns. Pace v. Kirschenbaum Investment, 92-CAA-8 (Sec'y, December 2, 1992).

The parties have requested that the undersigned speed the approval process for this settlement agreement. Therefore this Order is being telefaxed to counsel for both parties with direction that as soon as possible and not later than ten days of the date of this Order, they file a joint response providing clarifying information about the disposition of the \$25,000.00 and payment of attorneys' fees.

Christine S. McKenna
Administrative Law Judge